

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

CC Docket No. 96-45

In the Matter of

Federal-State Joint Board on Universal
 Service: Promoting Deployment and
 Subscribership in Unserved and
 Underserved Areas, Including Tribal and
 Insular Areas

COMMENTS OF THE TUSCARORA INDIAN NATION OF NEW YORK

The Tuscarora Indian Nation¹ ("Nation" or "Tuscarora") submits the following comments in response to the Federal Communication Commission's ("FCC" or "Commission") Further Notice of Proposed Rulemaking ("FNPRM") concerning the responsibilities and potential actions of the Federal-State Joint Board on Universal Service in addressing the unique issues that may limit telecommunications deployment and subscribership in the unserved and underserved regions of the United States, including certain tribal lands and insular areas.²

I. INTRODUCTION AND SUMMARY

The Commission began formally examining its relationship with Indian Tribes and the unique issues which influence deployment and subscribership on Indian lands in April of 1998.

¹ The Tuscarora Indian Nation of New York is a federally recognized Indian Tribe and tribal government located near Lewiston, New York, east of Niagara Falls and north of Buffalo. The Tuscarora Indian Nation exercises governmental jurisdiction over the Tuscarora Reservation, which is nearly 6,000 acres and is home to approximately 1200 people. About half of the people residing on the Tuscarora Reservation are under age nineteen or over age 64. The Tuscarora Indian Nation's sovereign status and inherent sovereign authority over its lands is acknowledged in the Treaty of Fort Stanwix, 7 Stat. 15 (Oct. 22, 1784); the Treaty of Fort Harmar, 7 Stat. 33 (Jan. 9, 1789); and the Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794).

² *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, FCC 99-204, 64 Fed. Reg. 52738 (Sept. 30, 1999).

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More recently, the Commission held hearings³ to help identify and overcome obstacles to telephone service in Indian country.⁴ These hearings explored the reasons for the low telephone deployment and subscribership in Indian country, and what some Indian Tribes have done to provide Indian country residents with better access to telephone services. As a result, the Commission initiated two proceedings to solicit and develop solutions to the severe telephone service problems in Indian country.⁵ The FNPRM seeks comment on issues impacting telecommunications services in unserved and underserved areas of the country, including “tribal and insular areas.” With respect to Indian country, the FNPRM seeks comment on a wide variety of issues, including the following: (1) the current levels of deployment and subscribership; (2) the availability of telecommunications services; and (3) impediments to increased deployment and penetration.

The Tuscarora Indian Nation generally supports the Commission’s efforts in these proceedings. The Nation also believes that these proceedings represent an opportunity for the Commission to develop a formal Indian policy which is respectful of tribal sovereignty, which acknowledges the trust responsibility that federal agencies have with respect to Indian Tribes, and which enhances the Commission’s government-to-government relations with Indian Tribes. However, the Nation believes that subscribership and penetration rates in Indian country will continue to lag unless the FCC takes a more active role in ensuring that local providers respect

³ The Commission held a January 1999 hearing at the Indian Pueblo Cultural Center in Albuquerque, NM and a March 1999 hearing at the Gila River Indian Community in Chandler, AZ.

⁴ “Indian country” is a legal term of art used to delineate federal, state and tribal jurisdictional authorities. It has been statutorily defined to mean (a) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the United States; and (c) all Indian allotments to which the Indian titles have not been extinguished, as well as the rights-of-way running through these allotments. See 18 U.S.C. § 1151.

⁵ In addition to this proceeding, the Commission released a Notice of Proposed Rulemaking (“NPRM”) concerning the extension of wireless telecommunications services to Indian lands. *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 96-266, FCC 99-205, 64 Fed. Reg. 49128 (Aug. 18, 1999). Comments on this NPRM were due on November 9, 1999, and reply comments are due on December 9, 1999.

tribal sovereignty and adhere to tribal law and custom. As long as the telecommunications business culture and regulatory structure fail to embrace tribal sovereignty, Indian self-determination and the basic tenets of Federal Indian law, local carriers will continue to be free to attempt to impose their values and practices upon sovereign tribal governments and the Indian and Native communities they serve. The Nation's specific comments will speak to these issues as well as the Nation's recent practical experiences with local telecommunications carriers.

II. FCC ACTION CONCERNING TELECOMMUNICATIONS IN INDIAN COUNTRY SHOULD BE GUIDED BY TRIBAL SOVEREIGNTY, SELF-DETERMINATION, THE FEDERAL TRUST RESPONSIBILITY AND GOVERNMENT-TO-GOVERNMENT RELATIONS

The issues raised in the FNPRM concerning the availability of telecommunications service in Indian country cannot be evaluated without addressing some of the fundamental principals of Federal Indian law and long-standing Federal Indian policy.

Tribal sovereignty and self-determination play a role in almost every issue impacting Indian country. The Federal trust responsibility and government-to-government relations influence how these issues are approached and resolved. Therefore, the Commission, when acting upon the questions in the FNPRM and in the review of comments received, must take into consideration how these principles relate to service goals and telecommunications practice.

While the Commission's recent efforts, including the hearings and the Federal Register notices, may well be invaluable in helping the Commission to assess the needs of the tribal participants, the Commission's federal trust responsibility is by no means discharged by a series of field hearings or communications with tribal leaders. Rather, the federal trust responsibility is continuing in nature. The Tuscarora Indian Nation believes it is crucial to the appropriate discharge of the federal trust responsibility that the Commission develop and implement with tribal input a formal Indian policy statement to guide all FCC policies and decisions which will impact and Indian tribe or community. In developing a formal Indian policy statement, the

Commission should take into consideration the policy statements other federal agencies have adopted and work on strengthening them.

Why should the Commission adopt a formal Indian policy statement? Because this would put federal officials and private sector economic interests on notice that the United States and its communications regulatory agency seek to have federal communications policy and practice acknowledge, promote and preserve tribal sovereignty and self-determination. To be useful, the policy statement must clearly define the roles and responsibilities of the Commission, Indian tribes, service providers and states concerning telecommunications services in Indian country. The policy statement must also be incorporated into the Commission's rules and procedures to ensure that Indian tribes are afforded the opportunity to participate more actively in the development and implementation of federal policies, as well as in the decision making process to the maximum extent practicable. This will help to nurture the government-to-government relationship Indian tribes have with the federal government, and will help both Indian tribes and the FCC be more responsive to the needs of the local Indian communities they serve. It will also help the Commission to be better able to fulfill its trust obligations towards Indians and their tribal governments.

Another primary function of a formal Indian policy statement must be the establishment of a formal consultation process to create an open dialogue between Indian tribes and the Commission. The Commission must consult on a government-to-government basis with all affected Indian tribes prior to taking action. The hearings held in the southwestern United States within the past year, as well as the publication of the FNPRM, the NPRM and any resulting comments, are supplemental to and not in lieu of formal tribal consultation. Each Federal agency has a continuous obligation to consult with Indian tribes that may be affected by agency action prior to taking such action.⁶ Without proper consultation, the Commission risks taking an

⁶ As President Clinton stated in his directive to executive departments and agencies, "[D]epartments and agencies undertak[ing] activities affecting Native American tribal rights or trust resources ... [should do so] in a knowledgeable, sensitive manner respectful of tribal sovereignty."

action that may work well in some contexts but may have unforeseen deleterious effects on other aspects of tribal sovereignty and Indian health, welfare and prosperity.

III. THE TUSCARORA INDIAN NATION'S UNIQUE EXPERIENCES WITH LOCAL TELECOMMUNICATIONS CARRIERS ARE A PRODUCT OF THE EVOLUTION OF TELECOMMUNICATIONS PRACTICE WITHOUT A FORMAL FCC INDIAN POLICY

Over the past several years, some local telecommunications carriers providing services to the Tuscarora Indian Reservation have taken a posture of refusing to provide service on the Reservation unless the Tuscarora Indian Nation agrees to allow the carriers to have unfettered access to Nation lands and to provide service to any home or business, regardless of whether the business is lawful or appropriate under the Nation's law . More specifically, the local telecommunications carriers take exception to established Tuscarora law and custom which requires that utilities obtain permission from the Nation's Council of Chiefs prior to entering upon Nation lands to provide service to existing accounts or to establish new accounts. Tuscarora law and custom requires that any utility entering the Reservation to conduct business on Tuscarora lands must first notify and obtain advance approval from the Council of Chiefs, the traditional governing body of the Nation. Similarly, an individual must seek the approval of the Council of Chiefs before operating a business on the Reservation. The authority to impose these requirements stems from the Tuscarora Indian Nation's status as a sovereign tribal government that owns and exercises governmental jurisdiction over all lands within the Nation's Reservation. See Treaty of Fort Stanwix, 7 Stat. 15 (Oct. 22, 1784); Treaty of Fort Harmar, 7 Stat. 33 (Jan. 9, 1789); Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794).

The Council of Chiefs has used this process as a lawful exercise of the Nation's sovereignty over the Reservation and as a means of regulating unauthorized use of Tuscarora lands. This is the process that the Council of Chiefs has used for countless years and it has proven to be a system that works rather well. In fact, over the past several years alone, the

Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (1994).

Council of Chiefs has authorized local telecommunications carriers to enter the Reservation and provide for repairs or other services to numerous households. It is only more recently when certain individuals have attempted to establish business ventures on the Reservation which are not authorized pursuant to Tuscarora law and custom that the Nation's process for providing or withholding its approval for service access by telecommunications carriers has become an issue. For example, the Council of Chiefs recently authorized one local communication carrier to enter the Reservation for the purpose of repairing and installing residential service, but required the carrier to obtain written authorization from the Council of Chiefs before repairing or installing any business telephone service. All of these actions are legitimate exercises of tribal sovereignty over tribal lands and are a fundamental exercise of the Nation's inherent right to govern itself and economic relations within the borders of its Reservation. At its heart, the actions of the Nation were exclusively related to internal matters of self-governance, one of the most protected rights of an Indian tribe under federal law.

Unable to tap the more lucrative market that unauthorized or illegal Reservation business might offer, the local carriers refused to come onto the Reservation for any and all residential service, including emergency repairs. As a result, nearly 40% of Reservation residents, and the households of nearly 50% of Tuscarora Indian School children, have no telephone service—and each time another phone line on the Reservation goes out of service, it stays out.⁷ Some households have not had working telephone service in years.

The carriers make two claims to justify their refusal to provide service on the Reservation in accordance with Tuscarora Indian Nation law and custom: (1) the process results in a situation where service is provided on an unlawful, discriminatory basis; and (2) the safety of their employees cannot be guaranteed. Both claims are simply unfounded.

⁷ This high of a percentage should readily qualify the community as “underserved” under any definition developed under the FNPRM. Similarly, because of the refusal of the local carrier to provide service beyond emergency repair, the community should also qualify as “unserved” under any definition developed under the FNPRM.

With respect to the first claim, the apparent argument is that the telephone carrier would be violating applicable non-discrimination provisions of State law if it were to abide by Tuscarora Indian Nation law and custom. However, the New York Public Service Commission (“NYPSC”) has already ruled in a related matter that the New York Public Service Law does not apply to the provision of service on Indian reservations.⁸ The local carriers cannot make any plausible argument that the provision of telecommunications service is somehow qualitatively different from the provision of electrical utility service. Moreover, in a March 1999 letter concerning one carrier’s refusal to provide telephone service, NYPSC Assistant Counsel Kathleen Burgess indicated that New York’s Public Service Law does not apply to the Tuscarora Reservation and, therefore, the NYPSC lacks the legal authority to require a telecommunications carrier to provide service to Reservation residents. The ruling and letter also acknowledge that the Nation has a vested interest in regulating utilities on the Reservation, and can take whatever lawful action is necessary to control the unauthorized use of Tuscarora lands. Thus, providing telephone service in accordance with Tuscarora law and custom would not violate New York’s Public Service Law, because the Public Service Law does not apply on the Tuscarora Reservation. Ironically, the carriers’ attempts to make the Public Service Law and its non-discrimination provisions applicable to the Reservation (in the hopes of tapping the more lucrative but unlawful business market), if successful, would actually have resulted in a situation where the carriers themselves would be violating those non-discrimination provisions. The carriers are seeking to give an undue and unreasonable preference and advantage to individuals operating businesses in contravention of Tuscarora law and custom, and are subjecting the

⁸ See *Petition of Niagara Mohawk Power Corp. for a Declaratory Ruling That an Indian Tribal Council’s Consent Prerequisites Negates NMPC’s Duty to Provide Service on Indian Reservations and, if NMPC’s Franchises are Invalid, NMPC’s Obligation to Serve the Reservation Ceases, Absent a Waiver of Sovereign Immunity by the Nation* (NYPSC Case 93-E-0947, Apr. 19, 1995) (“The threshold issue is whether the Public Service Law applies to Indian reservations, thereby empowering the Commission with the authority to regulate directly the manner in which NMPC provides service on the reservation.... Because there is no applicable federal grant of authority, the Commission may not directly regulate the provision of electricity on Indian Reservations.”) (“[T]he Commission finds and declares that it lacks jurisdiction over Indian reservations....”).

Reservation residents to an undue and unreasonable prejudice and disadvantage by refusing to provide local services because of Tuscarora law and custom. Cf. N.Y. Pub. Serv. Law § 91(3).⁹ Federal law imposes a similar non-discrimination provision that would likely result in a similar conclusion. See 47 U.S.C. § 202(a).¹⁰ The Tuscarora Indian Nation, both as a sovereign entity and as an owner of land, has the right and authority to take reasonable actions to keep individuals from conducting unauthorized and illegal activities on Nation lands. The carriers' refusal to provide services consistent with Tuscarora law and custom exposes Reservation residents to danger and, effectively, discriminates against them because they live within the territory of a sovereign tribal government that refuses to compromise its sovereignty.

The second claim, that some individuals who cannot get service to their homes or businesses have allegedly threatened carrier personnel, simply has no foundation. Local law enforcement (the county Sheriff's Department and State Police) indicate that there have been no reported threats or incidents on the Reservation involving telecommunications personnel. Moreover, the Nation has contacted the relevant law enforcement authorities to explain the situation, as well as the local carriers' perception of the situation, and has secured a commitment from law enforcement to respond to complaints regarding threats to telecommunications personnel on the Reservation. The subsequent refusal to come on the Reservation even with these commitments, which are not even needed in the first instance, shows that the companies are more concerned about business dollars than the welfare of Reservation residents.

The underlying issue here is the total disregard for the sovereignty of the Tuscarora Indian Nation and the Council of Chiefs. Telephone service on the Reservation is now

⁹ N.Y. Pub. Serv. Law § 91(3) provides: "No telegraph corporation or telephone corporation shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

¹⁰ 47 U.S.C. § 202(a) states: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

prohibitively expensive because the Nation lacks the fiscal resources to establish a tribally-owned telecommunications carrier to provide services that the existing carriers refuse to provide. Moreover, the Council of Chiefs refuses to compromise the sovereignty of the Nation and the well-being of the next seven generations—both of which would be compromised by allowing a telecommunications carrier to have unfettered access to Reservation lands and to aid and abet illegal business ventures on the Reservation.

Obviously, State regulators and local telecommunications service providers are influenced by the actions and inactions, and by the words and silence, of the Federal Communications Commission. The Nation does not here contend that the Commission has directly caused the local telecommunications carriers to refuse to provide service on the Reservation. Rather, the lack of a formal FCC Indian policy has allowed telecommunications practice to evolve in a partial vacuum which does not directly take into consideration at all important junctures the rights and authorities of Indian tribes and the existing Federal policy of promoting tribal self-determination. That vacuum has permitted some telecommunications providers to refuse to abide by Nation law and custom. The Commission should lead by example and establish a strong, formal Indian policy that acknowledges, promotes and protects tribal sovereignty and self-determination. Such a policy would create an atmosphere where Indian communities and telecommunications practices can thrive.

IV. THE COMMISSION SHOULD TAKE PROACTIVE STEPS UNDER THE AUTHORITY SET FORTH IN SECTION 214(e) TO ADDRESS TRIBAL TELECOMMUNICATIONS NEEDS

The Commission has the authority to order a common carrier to provide service “to an unserved community *or any portion thereof that requests such service*,” if no common carrier is providing services supported by the Federal universal service support mechanisms under section 254(c) of the Act. See 47 U.S.C. § 214(e)(3).¹¹ In order for the Commission to exercise this

¹¹ Under 47 U.S.C. § 254(c), the definition of services that are supported by Federal universal support mechanisms includes telecommunications services which: are essential to education, public

authority, the “area served” or the “interstate services” must not be subject to the jurisdiction of a State commission. See 47 U.S.C. § 214(e)(6). Before ordering a common carrier *or carriers* to provide such service, the Commission must determine which common carrier(s) are best able to service “to the requesting unserved community or portion thereof.” See 47 U.S.C. § 214(e)(3). Obviously, in the context of Indian country, there will be many instances where the “area served” is not subject to the authority of a State commission.

This provision of the Act provides the Commission with great flexibility to help meet tribal telecommunications needs. For example, the Commission could use its authority under this provision, upon receipt of a request, to require one or more local carriers who have been refusing, or simply not providing, service to an unserved Indian reservation to provide such service. While it is true that the statutory language speaks of a “requesting unserved community,” it also uses the term “or portion thereof.” This language provides the Commission with the authority to look beyond a “forest” of telephone service in an Indian community and to focus on the “trees,” or pockets, of a larger Indian community to aid the unserved portion of that community. For example, rather than excluding a smaller portion of an Indian community that is unserved from the scope of this provision simply because 60% of the larger community has service (as on the Tuscarora Indian Reservation), the Commission can and should focus on that smaller, unserved 40% of the larger community and order the appropriate carrier or carriers to provide service under the Act. To this end, the Commission should not establish a set minimum size requirement for meeting this prerequisite.

The Commission should incorporate in regulations and agency procedures its to-be-drafted formal Indian policy statement and should consult with the affected Indian tribes in the development of that statement. Tribal input is invaluable to a determination of whether a carrier is “best able” to provide the service in question. To the extent the Commission feels it is

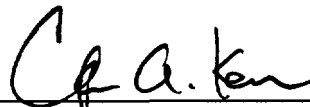
health or public safety; have been voluntarily subscribed to by a substantial majority of residential customers; are currently deployed in public telecommunications networks by carriers; and are consistent with the public interest, convenience and necessity. The Commission should consult with Indian tribes when contemplating a modification to the definition or the establishment of a final, formal list of what specific services fall within the scope of the definition.

prudent to adopt a competitive bidding process, it is imperative that the affected Indian community be made an integral part of the review and evaluation process. Also, in the context of issuing the order, the Commission should promote, protect and preserve tribal sovereignty and self-determination by mandating that the carrier provide the service in accordance with tribal law and custom. All such actions would clearly further the Commission's statutory mandate of promoting the availability of telecommunications services supported by federal universal service support mechanisms, while simultaneously engaging in formal government-to-government consultation and coordination in the implementation of the Act.

V. CONCLUSION

The Tuscarora Indian Nation commends the Commission for taking a proactive posture in helping Indian communities access affordable, reliable and efficient telecommunications service. The Nation remains hopeful that the Commission's efforts, with meaningful tribal participation, will help to ensure that Indian tribes enjoy some of the economic and social benefits of the telecommunications revolution. The Nation urges the Commission to ensure that any actions it takes pursuant to this proceeding are consistent with its federal trust responsibilities. In addition, the Commission must, on an expedited basis, establish a formal government-to-government Indian policy statement.

Respectfully submitted,



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December 17, 1999

CERTIFICATE OF SERVICE

I, Christopher A. Karns, do hereby certify that copies of the **COMMENTS OF THE TUSCARORA INDIAN NATION OF NEW YORK** were delivered, via U.S. Mail, on this 17th day of December, 1999, to the following:

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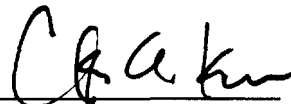
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